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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

DANNY CARTSON TIETJEN, JR.,

Defendant and Appellant.

C059369

(Super.Ct.No.
07F11415)

Defendant Danny Tietjen punched his neighbor, fracturing the victim's facial bones. Charged with two violent felonies (Pen. Code, §§ 243, subd. (d), 245, subd. (a)(1), 12022.7, subd. (a)), defendant pled no contest to battery with infliction of serious bodily injury, as a misdemeanor. (Pen. Code, § 243, subd. (d).) Consistent with the plea agreement, he was placed on probation with conditions which include that he serve 180 days in jail and stay away from the victim.

With an exception not applicable in this case, Penal Code section 12021, subdivision (c)(1) provides that "any person who has been convicted of a misdemeanor violation of [specified conduct,

including battery with infliction of serious bodily injury], and who, within 10 years of the conviction, owns, purchases, receives, or has in his or her possession or under his or her custody or control, any firearm is guilty of a public offense, which shall be punishable by imprisonment in a county jail not exceeding one year or in the state prison, by a fine not exceeding one thousand dollars (\$1,000), or by both that imprisonment and fine. . . .” (Further section references are to the Penal Code unless otherwise specified.)

As he did in the trial court, defendant contends this statute prohibiting certain misdemeanants from possessing firearms violates his right to bear arms, guaranteed by the Second Amendment to the United States Constitution, as interpreted in *District of Columbia v. Heller* (2008) 554 U.S. ____ [171 L.Ed.2d 637] (hereafter *Heller*).)

Division One of the Fourth Appellate District has rejected such a contention. (*People v. Flores* (2008) 169 Cal.App.4th 568, 573-575.) So do we. (Cf. *People v. Villa* (2009) 178 Cal.App.4th 443, 448-449 [§ 12021, subd. (e), which makes it unlawful for a person to possess a firearm if he or she has been adjudicated to have committed certain violent or serious crimes as a juvenile, does not violate the Second Amendment].)

We also reject defendant’s equal protection of laws challenge to section 12021, subdivision (c)(1). Thus, we shall affirm the judgment.

DISCUSSION

I

The Second Amendment to the United States Constitution provides: “A well regulated militia, being necessary to the security of a free

state, the right of the people to keep and bear arms, shall not be infringed.”

In *Heller*, the United States Supreme Court rejected a claim that the Second Amendment “protects only the right to possess and carry a firearm in connection with militia service.” (*Heller, supra*, 554 U.S. at p. ____ [171 L.Ed.2d at p. 648.]) Instead, the court interpreted the Second Amendment to “guarantee the individual right to possess and carry firearms in case of confrontation.” (*Id.* at p. ____ [171 L.Ed.2d at p. 657.]) In other words, it includes a person’s right to possess firearms in his or her home to use for self-defense. (*Id.* at pp. ____ [171 L.Ed.2d at pp. 679, 683.]) However, this right is “not unlimited” because, in the words of the Supreme Court, “we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.” (*Id.* at p. ____ [171 L.Ed.2d at p. 659], original italics.) Historical analysis has “routinely explained that the right [is] not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose”; the Second Amendment protects only the possession of “the sorts of weapons” that were “‘in common use at the time’” the Second Amendment was adopted. (*Id.* at p. ____ [171 L.Ed.2d at p. 678].)¹

¹ *Heller* left open the question of whether the Second Amendment is incorporated through the Fourteenth Amendment and, thus, is applicable to the states. (*Heller, supra*, 554 U.S. at p. ____, fn. 23 [171 L.Ed.2d at p. 674, fn. 23]; *People v. Yarbrough* (2008) 169 Cal.App.4th 303, 312, fn. 3, 313; *People v. Flores, supra*, 169 Cal.App.4th at p. 573, fn. 4; *U.S. v. Fincher* (8th

The Supreme Court did not specify the limitations that the government may place on an person's right to possess firearms, but it enumerated a nonexclusive list of the many "presumptively lawful regulatory measures." (*Heller, supra*, 554 U.S. at p. ___, fn. 26 [171 L.Ed.2d at p. 678, fn. 26].) "Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." (*Id.* at p. ___ [171 L.Ed.2d at p. 678], fn. omitted.)

Defendant was not convicted of a felony; rather, his conviction was for the misdemeanor of battery with infliction of serious bodily injury. (§ 243, subd. (d).) By statute, this conviction precludes defendant from owning and possessing a firearm within 10 years of the conviction. (§ 12021, subd. (c)(1).)

Defendant contends (1) the firearm ban of section 12021 is subject to strict judicial scrutiny because it infringes upon his Second Amendment right to possess a firearm, and (2) it cannot withstand the strict scrutiny test, which requires the law to be narrowly tailored and to be the least restrictive means possible

Cir. 2008) 538 F.3d 868, 873, fn. 2.)

We need not resolve this question because, as we will explain, assuming the Second Amendment applies to the states, defendant's constitutional rights are not violated by section 12021, subdivision (c)(1).

to achieve a compelling governmental interest. (*San Antonio School District v. Rodriguez* (1973) 411 U.S. 1, 16 [36 L.Ed.2d 16, 33]; *People v. Garelick* (2008) 161 Cal.App.4th 1107, 1123; *Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, 218.)

In *Heller*, the Supreme Court declined to adopt a level of scrutiny to be imposed on Second Amendment restrictions (*Heller*, *supra*, 554 U.S. at p. ____ [171 L.Ed.2d at pp. 682-683]); instead, the court held that the challenged law, which precluded a private citizen from keeping a handgun in a readily useable state in the home for protection, was unconstitutional “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights.” (*Id.* at p. ____ [171 L.Ed.2d at p. 679].) That said, the Supreme Court rejected applying the rational basis test for future Second Amendment challenges. (*Id.* at p. ____, fn. 27 [171 L.Ed.2d at p. 679, fn. 27].)

Rejection of rational basis review does not compel the use of strict scrutiny in this case. Courts generally apply strict scrutiny to laws that interfere with fundamental constitutional rights or that involve suspect classifications, such as race and national origin. (*San Antonio School District v. Rodriguez*, *supra*, 411 U.S. at pp. 16-17 [36 L.Ed.2d at p. 33].) Defendant’s argument that strict scrutiny applies presupposes the right to bear arms is fundamental. However, *Heller* did not explicitly declare this to be so. (*U.S. v. Miller* (W.D.Tenn. 2009) 604 F.Supp.2d 1162, 1170.) Indeed, courts have held that, by not adopting a level of scrutiny for Second Amendment regulations, *Heller* “left standing the venerable holding in *United States v. Cruikshank* [(1875) 92 U.S. 542, 553 [23 L.Ed.

588, 591-592]], that the private right to bear arms is not a 'fundamental' right under the Second Amendment to the United States Constitution. [Citations.]" (*People v. Yarbrough*, *supra*, 169 Cal.App.4th at p. 312, fn. 4; see also *U.S. v. Darrington* (5th Cir. 2003) 351 F.3d 632, 635 [declining to hold that any governmental restrictions on the right to bear arms must meet a constitutional strict scrutiny test]; *U.S. v. Miller*, *supra*, 604 F.Supp.2d at p. 1171 [if *Heller* had intended to overrule the longstanding consensus that the right to bear arms is not fundamental, it could have done so explicitly]; but see *U.S. v. Engstrum* (D.Utah 2009) 609 F.Supp.2d 1227, 1231 [applying strict scrutiny to a statute making it unlawful for a person convicted of misdemeanor domestic violence to possess a gun, but finding the law passes constitutional muster because it was narrowly tailored to achieve the compelling governmental interest of protecting domestic partners and children from those who pose a prospective risk of violence].)

In the absence of a holding by the United States Supreme Court that the Second Amendment is a fundamental right that triggers the strict scrutiny test, we will apply the intermediate scrutiny test, which lies between the exacting standards of strict scrutiny and the highly deferential standards of a rational basis analysis. Applying the intermediate scrutiny test is consistent with the Supreme Court's observation that government regulations prohibiting possession of firearms by felons and the mentally ill, or in certain sensitive places, or imposing conditions and qualifications on the commercial sale of firearms, do not violate the Second Amendment. (*Heller*, *supra*, 554 U.S. ____ [171 L.Ed.2d at p. 678].)

"To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective." (*Clark v. Jeter* (1988) 486 U.S. 456, 461 [100 L.Ed.2d 465, 472].) The purpose of section 12021 is to prevent violent crime and to maintain public safety by curtailing the easy availability of firearms to those who have shown they pose a threat to the community peace and are more likely to use guns for improper purposes. (*People v. Pepper* (1996) 41 Cal.App.4th 1029, 1037.) Maintaining public safety is an important governmental objective (cf. *Schall v. Martin* (1984) 467 U.S. 253, 264 [81 L.Ed.2d 207, 217]; *Vo v. City of Garden Grove* (2004) 115 Cal.App.4th 425, 441), and the 10-year prohibition against firearm possession by misdemeanants convicted of crimes that threaten the public safety substantially relates to this objective.

"If, as *Heller* emphasizes, the Second Amendment permits the government to proscribe the possession of a firearm by any felon (including nonviolent offenders), we can see no principled argument that the government cannot also add certain misdemeanants, particularly those who have committed an assault The public interest in a prohibition on firearms possession is at its apex in circumstances, as here, where a statute disarms persons who have proven unable to control violent criminal impulses. [Citations.]" (*People v. Flores, supra*, 169 Cal.App.4th at p. 575.)

Without provocation, defendant broke the facial bones of a neighbor, who merely attempted to view the other side of his own car to see if people on defendant's property had damaged it with a thrown object. Defendant punched the neighbor, inflicting serious

bodily injury, simply because the victim had the "audacity" to step over defendant's property line in the process.

Because prohibiting the possession of a firearm by a person with defendant's poor level of impulse control and inability to express anger in a nonviolent way is substantially related to the important governmental objective of protecting public safety, the statutory 10-year prohibition against gun possession by misdemeanants convicted of violent crimes passes constitutional muster.²

II

Section 12021, subdivision (c)(1) applies to individuals with enumerated misdemeanor convictions *within California*, whereas the statute restricting firearm possession by a felon within 10 years

² Defendant also contends that his appeal "necessarily includes a challenge to the constitutionality of the prohibition against the possession of ammunition" set forth in subdivision (b) of section 12316. This contention is forfeited because he failed to raise it in the trial court; failed to raise the argument under an appropriate heading in his appellate brief; and failed to provide any meaningful analysis concerning how the ammunition prohibition violates his Second Amendment right to bear arms. (*People v. Esquibel* (2008) 166 Cal.App.4th 539, 556 [the failure to object in the trial court, even to errors of constitutional dimension, may lead to forfeiture of the claim on appeal]; *People v. Harper* (2000) 82 Cal.App.4th 1413, 1419, fn. 4 [argument is forfeited if it is not set forth under a separate argument heading and is raised in a perfunctory fashion without supporting analysis and authority].) Defendant simply asserts: "Any reading of the Second Amendment that, as [he] proposes, allows him to possess a firearm would be meaningless unless he could also possess ammunition for that firearm." However, defendant will have no immediate need for ammunition because the section 12021 prohibition against his possession of a firearm within 10 years of his conviction does not violate the Second Amendment.

of conviction (§ 12021, subd. (a)(1)) applies to individuals who have been convicted of a felony "under the laws of the United States, the State of California, or any other state, government, or country."

Asserting that all persons similarly situated must be treated alike, defendant claims section 12021, subdivision (c)(1) violates his right to equal protection of laws because it "irrationally discriminates between persons who are convicted of disqualifying California misdemeanors and those who are convicted of equivalent offenses in other states or countries."

"The crux of the constitutional promise of equal protection is that persons similarly situated shall be treated equally by the laws. [Citation.] However, neither clause [of the United States or California Constitutions] prohibits legislative bodies from making classifications; they simply require that laws or other governmental regulations be justified by sufficient reasons. The necessary quantum of such reasons varies, depending on the nature of the classification. [¶] Legislation which discriminates on the basis of a 'suspect class' or touches on a fundamental right is subject to judicial examination under the 'strict scrutiny' test" (*In re Evans* (1996) 49 Cal.App.4th 1263, 1270 (hereafter *Evans*), which requires the state to establish that its interest intended to be served by the challenged classification is necessary to achieve a compelling state interest. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200.)) "However, most legislation challenged under the equal protection clause is evaluated merely for the existence of a 'rational basis' supporting its enactment. [Citations.] Under the latter analysis, the question is whether the classification bears a fair relationship

to a legitimate public purpose. [Citation.]” (*Evans, supra*, 49 Cal.App.4th at p. 1270.)

Evans addressed an equal protection challenge to provisions of section 12021, subdivision (c) providing that certain individuals may seek relief from the statute’s prohibition against firearm possession. Observing that “[t]he classification of misdemeanants does not involve a typically suspect classification such as race or sex,” *Evans* determined the classification should be analyzed under the rational basis test. (*Evans, supra*, 49 Cal.App.4th at p. 1270.) In reaching this conclusion, *Evans* emphasized that “the private right to bear arms” is not fundamental under the Second Amendment. (*Ibid.*) But *Heller* later recognized that the right to bear arms is a private right guaranteed by the Second Amendment. (*Heller, supra*, 554 U.S. at p. ____ [171 L.Ed.2d at pp. 679, 683].) Nevertheless, *Heller* observed that certain individuals may be “disqualified” from exercising their Second Amendment rights (such as the mentally ill and those convicted of felonies). (*Id.* at ____ [171 L.Ed.2d at pp. 683-684].) Because defendant falls within section 12021, subdivision (c)(1)’s classification of individuals prohibited from possessing a firearm within 10 years of conviction, he is “disqualified” from exercising his Second Amendment rights. In other words, because his prior conviction has disqualified him from exercising such rights, he does not have a “fundamental right” to possess a firearm.

Accordingly, we conclude, as has the United States Court of Appeals, for the Fifth Circuit, that “for equal protection purposes,” a person convicted of a crime which disqualifies the person from

possessing a firearm does not have a fundamental right to keep and bear arms; thus governmental restrictions on this right are not subject to strict scrutiny by the courts. (*U.S. v. Darrington, supra*, 351 F.3d at p. 635.)

Thus, assuming that the differing treatment of those who have been convicted of specified misdemeanors in California compared to those who have been convicted of such misdemeanors in other jurisdictions creates similarly situated classes, the question is whether the difference in treatment bears a fair relationship to a legitimate public purpose. (See *Evans, supra*, 49 Cal.App.4th at p. 1270.) California law restricts firearm possession by defendants convicted of the misdemeanors enumerated in subdivision (c)(1) of section 12021 only after the defendants have been allowed representation by counsel and have been given notice of the restriction. Such protections may not be afforded in other states. In addition, the elements of the offenses may differ among the states. (See *U.S. v. Moore* (7th Cir. 2008) 543 F.3d 891, 897.) Defendant has therefore failed to show that he is similarly situated to misdemeanants convicted outside of California and, even if he is so situated, that the differing treatment does not bear a fair relationship to a legitimate state purpose. Consequently, his equal protection challenge to section 12021, subdivision (c)(1) fails.

DISPOSITION

The judgment is affirmed.

SCOTLAND, P. J.

We concur:

ROBIE, J.

CANTIL-SAKAUYE, J.